Jumax Associates v 350 Cabrini Owners Corp.
2006 NY Slip Op 30463(U)
January 18, 2006
Supreme Court, New York County
Docket Number: 603954/02
Judge: Richard B. Lowe
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SCANNED ON 1/27/2006

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E 1-27-06

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RICHARD B. LOWE III, Justice

PART 56

JUMAX ASSOCIATES

- v -

350 CABRINI OWNERS CORP.

INDEX NO. 603954/02

MOTION DATE 10/25/05

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for ______

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits ______

Replying Affidavits ______

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

NYS SUPREME COURT RECEIVED JAN 25 2006 IAS MOTION SUPPORT OFFICE

FILED JAN 25 2006 NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/18/2006

RICHARD B. LOWE III, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

---x

JUMAX ASSOCIATES,
Plaintiff,

603954/02

- against -

DECISION AND ORDER

350 CABRINI OWNERS CORP.,
Defendant.

---x

RICHARD B. LOWE, III, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence 001, Defendant 350 Cabrini Owners Corp. (the "Co-op") moves for summary judgment pursuant to CPLR 3212 dismissing the Complaint based on the affirmative defenses of Statute of Limitations, failure to state a claim, waiver, estoppel, documentary evidence, and the alleged fact that Plaintiff Jumax Associates (Jumax) never held title to the building located at 350 Cabrini Boulevard, New York, New York ("350 Cabrini Boulevard"). In motion sequence 002, the Co-op further moves for summary judgment as to its first counterclaim against Jumax to declare its rights to the roof at 350 Cabrini Boulevard.

BACKGROUND

The underlying dispute at issue is who owns the roof rights to the property located at 350 Cabrini Boulevard. The following facts are taken from the Rule 19-a Statements of Undisputed Material Facts and accompanying affidavits submitted by Jumax and the Co-op.

The Co-op is an apartment corporation formed under the New York Business Corporations Law, and is situated at 350 Cabrini Boulevard, New York, New York. Jumax Associates is a partnership originally composed of Irwin Kallman (I. Kallman) and Edwin Lax (Lax). Later, I. Kallman's son Jonathan Kallman (J. Kallman), joined Jumax in 1996.

On December 20, 1984, a Contract of Sale concerning the purchase of the premises at 350 Cabrini Boulevard was executed by The 350 Cabrini Company as "seller," and I. Kallman and Lax as "purchasers" (*see* Def. Statement of Material Facts, Ex. C).

A cooperative conversion plan for the premises (the "offering plan"), proposed and executed by Jumax as sponsor on March 4, 1986, was entered into by the Co-op. Further, under the offering plan, the Co-op entered into a contract to purchase title to 350 Cabrini Boulevard from Jumax, as the contract vendee under the December 20, 1984 contract of sale (*see id.*, Ex. B at 1). The offering plan was accepted for filing by the New York State Attorney General on March 20, 1986. Under the offering plan, Jumax retained to itself "all rights to the roof and roof areas, and any transferable development rights, and shall have the right to transfer same without restriction of any kinds" (*id.*). The offering plan also provides that the term "property" referred "to the land and the building" (*id.* at 3). In addition, the offering plan annexes an agreement dated April 2, 1985, in which Jumax caused the property to be conveyed to the Co-op by Bargain and Sale Deed (*see id.*, Ex. B at 54).

The offering plan further contains a closing survival representation of sponsor Jumax, that the "terms and conditions of this [offering] Plan and the exceptions subject to which the Apartment Corporation [the Co-op] is to take title may be omitted from the deed, but they shall nonetheless survive the closing" (*id.* at 55). The offering plan also reserves rights prior to the closing on the property to Jumax. Finally, other documents in this transaction, including the Subscription Agreement and the Proprietary Lease and Survival Agreement, provide that the offering plan controls (*id.*).

On March 4, 1986, an Assignment and Assumption Agreement was executed by and between I. Kallman and Lax, as "assignors," and the Co-op, as "assignees" (*see id.*, Ex. D).

Pursuant to the Assignment and Assumption Agreement, Kallman and Lax assigned to the Co-op "all of their right, title and interest" in the building (*see id.*). A survival agreement was also executed "in connection with the consummation of the offering plan" (*see id.*, Ex. E), which provides that "[a]ll obligations of the Sponsor and the Apartment Corporation under the Plan and any amendments thereto . . . shall survive the closing" (*id.*).

On November 19, 1986, the defendant purchased from The 350 Cabrini Company the land, buildings, and improvements at 350 Cabrini Boulevard by Indenture Agreement (*see id.*, Ex. A). On the same date, an updated Assignment and Assumption Agreement was signed by Lax, doing business as Jumax and the Co-op, which canceled the Assignment and Assumption Agreement made on March 4, 1986 (*see* J. Kallman Aff., Ex. 2). The new contract assigns to the Co-op "all of Assignors' right, title and interest in and to the Contract" dated December 20, 1984, which was entered into "by and between the 350 Cabrini Company, as Seller and Irwin Kallman and Edwin G. Lax as Purchaser" (*id.*). In consideration of the assignment, the Co-op agreed to issue all of its issued and outstanding stock and proprietary leases appurtenant thereto to Kallman and Lax upon the closing of title to the Co-op, as the owner of the premises at 350 Cabrini Boulevard, as well as assumed all the obligations to be performed by Kallman and Lax.

Until 2002, Jumax never asserted any claim that it owned rights to the roof areas of 350 Cabrini Boulevard. However, Jumax maintained representation on the Board of Directors of the Co-op for that period of time. Both I. Kallman and J. Kallman, principals of Jumax, served as members, as Vice Presidents, and as Presidents of the Board of Directors of the Co-op. I. Kallman served on the Board of Directors of the Co-op from 1986 to 2000. J. Kallman served on the Board of Directors from 1986 to 2002.

The present action centers around license agreements entered into by and between the Co-op, of which both I. Kallman and J. Kallman were directors during this time period, and Cellular Telephone Company as Licensee in September 1995, amended in December 1997, April 2000, November 2001, and May 2003 (*see* Def. Statement of Material Facts, Ex. G, H). The license agreements granted use of a portion of the roof at 350 Cabrini Boulevard in exchange for a monthly license fee to the Co-op (*id.*). Each of the amendments reasserted the terms of the offering plan (*id.*).

On April 26, 2002, Jumax provided, by written letter to the Board of Directors of the Co-op, that it was asserting under the offering plan its rights to the roof and roof areas (*see id.*, Ex. K). In July 2002, Jumax further demanded that the Co-op perform its contractual obligations (*see* J. Kallman Aff., Ex. 11). On October 28, 2002, Jumax brought suit against the Co-op for compensatory damages for failure to provide the income from the license fees. On February 7, 2003, defendant Co-op answered Jumax's complaint, asserting various affirmative defenses to plaintiff's claim for breach of contract, and further counterclaims against Jumax for declaratory judgment as to the rights to the roof (first counterclaim), tortious interference with contractual relations between the Co-op and Cellular Telephone Company (second counterclaim), and a permanent injunction enjoining Jumax from representing itself on behalf of 350 Cabrini Boulevard (third counterclaim).

DISCUSSION

In a motion for summary judgment "supported by affidavit," the motion "shall recite all the material facts and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit" (CPLR 3212[b]). The court will grant the motion "if, upon all

the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (*id.*). Since summary judgment deprives a party of its day in court, it may be "granted without a trial only if no genuine, triable issue of fact is presented" (*Ugarriza v Schmieder*, 46 NY2d 471, 474 [1979]). The party opposing the motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests (*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966, 967 [1988]).

The Co-op alleges the following affirmative defenses in its motion for summary judgment and dismissal of the plaintiff's Complaint: statute of limitations (first affirmative defense), failure to state a claim (second affirmative defense), waiver (sixth affirmative defense), estoppel (seventh affirmative defense), documentary evidence (ninth affirmative defense), and the alleged fact that Plaintiff Jumax never held title to the building (tenth affirmative defense). The Co-op also moves for summary judgment as to its first counterclaim, namely, to declare that the rights to the roof at 350 Cabrini Boulevard are the Co-op's. The court first addresses the Co-op's affirmative defenses prior to addressing the issue of which party has roof rights.

I. *Affirmative Defenses*

B. *Statute of Limitations*

The first affirmative defense the Co-op asserts against Jumax for dismissal of the Complaint is that of the Statute of Limitations (first affirmative defense). The defendant argues that the Complaint sounds in unjust enrichment, and, under CPLR 213, has a Statute of Limitations provision of six-years. Therefore, the Co-op argues that because the original licensing agreement was executed in September 1995, and because this action was commenced in October 30, 2002, the Statute of Limitations prohibits Jumax from bringing this cause of

action. Alternatively, the defendant avers that, on the basis of CPLR 212, the plaintiff may not bring an action due to the Co-op's adverse possession of the roof.

The plaintiff argues that this is not an unjust enrichment claim but a breach of contract claim. Jumax alleges that the breach occurred in July 2002 when it demanded and the Co-op refused to execute an assignment of the right to payment under the License Agreement, as it alleges it was obligated to do under Section 9 of the Survival Agreement and the offering plan. The court deals with the issue of what cause of action the plaintiff is averring to in the Complaint prior to handling the Statute of Limitations affirmative defense.

1. <u>Contract or Unjust Enrichment</u>

Whether under a breach of contract claim or an unjust enrichment claim, CPLR 213 provides that the applicable limitations period is six years. Nonetheless, where there is a difference of opinion as to the correct cause of action, the court reviews the Complaint and "the substantive remedy which the plaintiff seeks" in determining the applicable cause of action and Statute of Limitations provision (*Loengard, Jr. v. Santa Fe Industries, Inc.*, 70 NY2d 262, 266 [1987]). Here, the substantive remedy the plaintiff seeks is for compensatory damages and monthly license fees from the contractual agreements entered into between the Co-op and Cellular Telephone Company, due to the purported failure on the part of the defendant to honor the alleged contract between the Co-op and Jumax concerning the roof. Accordingly, this is an action for the claim of breach of contract, and the Statute of Limitations period is six years (*see* CPLR 213).

2. <u>Breach of 1986 Contracts Claims</u>

The basic disagreement is when exactly the Statute of Limitations began to run, and, specifically, whether demand was necessary in order for the limitations period to run. The

plaintiff avers that the breach of contract claim occurred in July 2002 when it demanded and the Co-op refused to execute an assignment of the right to payment under the various agreements, partly basing its claim on CPLR 206(a). Jumax argues that because demand is essential to its breach of contract cause of action, and because the actual demand was made in 2002, the action is within the applicable limitations period. The defendant, on the other hand, argues that because the License Agreement between the Co-op and Cellular Telephone Company was signed in September 1995, and as such, the Statute of Limitations period should have begun in 1995. Further, the Co-op argues that, even if demand was appropriate, the plaintiff should have made the demand in September 1995, because the plaintiff, being on the Board of Directors of the Co-op and having been part and parcel to the agreements, had more than enough opportunities to assert claims to the proceeds.

CPLR 206(a) provides that "where a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete." However, where the agreement did not specify time for performance, the Statute of Limitations period does not begin to run until after one of the parties to the agreement make a specific demand for performance (*accord Ganley v. Troy City Nat'l Bank*, 98 NY 487 [1885]; *Lopez v Highmount Associates*, 101 AD2d 618 [3d Dept 1984]; *Frigi-Griffin, Inc. v Leeds*, 52 AD2d 805 [1st Dept 1976]; *Rossi v Oristian*, 50 AD2d 44 [4th Dept 1975]).

Here, the underlying agreements - the offering plan, the Assignment and Assumption Agreement, the Subscription Agreement and the Proprietary Lease and Survival Agreement - do not provide a specific time for Jumax to assert claims to the roof. Accordingly, the specific demand for performance was made in July 2002, and, because of the refusal on the part of the

Co-op to assign the right of payment to Jumax, the breach of contract as to the underlying agreements occurred at that time. As such, Jumax plainly brought this action in a timely matter and has the right to bring a cause of action for compensatory damages for failure of the Co-op to assign its rights under the Licensing Agreements to Jumax and for monthly licensing fees from the agreements after the rights are assigned.

3. Licensing Agreement and Breach

The plaintiff argues that it had the right to bring claim when it was denied the proceeds by the Co-op in 2002. Alternatively, the plaintiff argues that there was a continuing violation of breach of contract each time it collected income from the Licensing Agreement. Again, the defendant argues that Jumax should have brought claim in 1995, when the first agreement was signed between the Co-op and Cellular Telephone Company. The Co-op also avers that since the fees come from one set of agreement, there is no continuing violation.

Even where it is generally settled that demand is necessary for the Statute of Limitations to run where an agreement does not specify a time for performance, it is also clear that, in breach of contracts claims, *the statute of limitations starts to run as of the date when a demand could have been made* (*see Transpacific S.S. Co. v Marine Office of America*, 6 Misc. 2d 881, 884 [Sup Ct, NY County 1957, Steuer, J.], *affd* 5 AD2d 860 [1st Dept 1958][emphasis added]).

As to the agreement signed by the Co-op and Cellular Telephone Company, Jumax had more than one opportunity to assert its right to the licensing fees that the Co-op received from Cellular Telephone Company. There is no dispute that Jumax held seats on the Board of Directors of the Co-op. There is also no disagreement that Jumax, through I. Kellman as well as J. Kellman, participated and led the efforts of the Co-op to license the roof space of 350 Cabrini Boulevard to outside vendors. Since 1995, Jumax had the ability to demand its share to the fees

and did not do so. Accordingly, the right to assert distribution of the fees from September 1995 to at least July 1996, six years prior to Jumax's July 2002 demand, is barred by the Statute of Limitations.

In the alternative, the plaintiff argues that this failure to assign the proceeds under the Licensing agreement was a continuing breach because the Co-op continues to collect income, arguing that each time there is a collection of the income, a new cause of action accrues. The defendant avers that the operative Licensing Agreement which provides for distribution of fees was signed in September 1995, and, as such, is beyond the applicable time limitations. Here, the court agrees with the plaintiff.

A new cause of action accrues each time there is a continuing wrong (*Butler v Gibbons*, 173 AD2d 352, 353 [1st Dept 1991]; *see also Bulova Watch Co. v Celotex Corp.*, 46 NY2d 606 [1979]; *Kerr v Brown*, 283 AD2d 343 [1st Dept 2001]). Here, the Co-op continued to collect on the licensing agreement and refused to assign the proceeds to Jumax. Instead, the defendant continued to keep the proceeds for itself. Accordingly, proceeds from July 1996 to the present are not barred by the Statute of Limitations, as such proceeds "were retained by defendant during the six years preceding commencement of this action" (*id.*). As such, a claim for the proceeds from July 1996 to the present under the Licensing Agreements between the Co-op and Cellular Telephone Company is a viable and recoverable cause of action.

B. *Waiver and Estoppel*

The defendant also moves for summary judgment and dismissal of the Complaint based on waiver (sixth affirmative defense) and estoppel (seventh affirmative defense), arguing that the plaintiff waived its rights to the roof and to the proceeds of the Licensing Agreement when it actively participated in the Licensing Agreement and various amendments to those agreements,

and further argues that the plaintiff is estopped from asserting a cause of action based on those agreements because of gross injustice on the community at 350 Cabrini Boulevard. The plaintiff argues that there was no actual waiver because it did not have any intention to relinquish its right to the roof, nor is there estoppel because the requisite elements are missing.

To assert the affirmative defense of waiver, the defendant must show that there has been a voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable (*McManus v Board of Educ.*, 87 NY2d 183, 189 [1995]; *Werking v Amity Estates*, 2 NY2d 43, 52 [1956]). A waiver "may be accomplished by express agreement *or by such conduct or failure to act as to evince an intent not to claim the purported advantage*" (*Hadden v Consolidated Edison Co.*, 45 NY2d 466, 469 [1978][emphasis added]; *see also Matter of City of Rochester*, 208 NY 188, 197 [1913]).

Here, the Co-op has shown that the plaintiff intentionally waived its right to the fees by its conduct and failure to act. It is beyond argument that the offering plan was amended at least twenty-one times since the original document entered into in 1986, with Jumax as the executor of these various amendments (*see* Def. Statement of Material Facts, Ex. J). Further, it is undisputed that the partners of Jumax were on the Board of Directors of the Co-op. Even giving all favorable inferences to the non-movant, it is disingenuous at best for Jumax to argue that they did not recall that Jumax had rights to the roof, where they were members of the Co-op, active participants in the contractual negotiations between the Co-op and Cellular Telephone Company, and were the executors of the offering plan. Jumax's failure to act on behalf of itself to the roof rights and to the income generated by the Licensing Agreement evinces the intent not to claim the advantage it seeks to claim today. Jumax's general partners were members of the Board of Directors of the Co-op, and were part and parcel to the agreements and amendments to the

Licensing Agreements signed between the Co-op and Cellular Telephone Company. Accordingly, Jumax is not entitled to the income generated by the Licensing Agreements between the Co-op and Cellular Telephone Company.

As to the affirmative defense of estoppel, the defendant must show that "the person sought to be estopped must [have done] some act or [made] some admission with an intention of influencing the conduct of another . . . and which act or admission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct" (*Werking v Amity Estates, Inc.*, 2 NY2d at 53, quoting *New York Rubber Co. v Rothery*, 107 NY 310, 316 [1887]).

Here, the defendant has also demonstrated that Jumax acted in such a way that has influenced the Co-op in its decision to work with Cellular Telephone Company. Without reiterating the reasons noted above, it is enough for the court to note that Jumax acted in such a way that allowed the Co-op to believe that the rights to the roof and, accordingly, the income from these contractual agreements with outside vendors is that of the Co-op's. The current act of reclaiming proceeds is inconsistent to Jumax's prior acts, and the court will not allow Jumax to bring this action years after it acted in accordance to the contractual agreement.

As such, the defendant's motion for summary judgment to dismiss the Complaint for the affirmative defenses of waiver (sixth affirmative defense) and for estoppel (seventh affirmative defense) is granted as to compensatory damages and for fees since July 1996 to the present, and the Complaint is dismissed.

II. *Counterclaims: Declaration of Roof Rights*

The only counterclaim at issue here is the declaration of the parties' roof rights. The Co-op argues that because it "acquired title to the Premises" under the Indenture Agreement made

between the Co-op and The 350 Cabrini Company, and because Jumax "removed itself from the position of being the direct purchaser of the Premises" and the Co-op became the direct owner as a result of the purchase, Jumax can not assert retention of a portion of something it never "owned" (*see* Def. Memo of Law). The Co-op also argues that the offering plan is nothing more than an informational document, and, accordingly, cannot be construed as any agreement between the parties. Conversely, the plaintiff argues that the offering plan controls this transaction, in light of the various agreements that were signed at the same time as the closing and to which referenced the plan as the controlling document in any and all conflicts that may arise (*see* Pl. Memo of Law).

A. *Contractual Agreement*

"It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1999]; quoting *Breed v Insurance Co.*, 46 NY2d 351, 355 [1978][internal quotations omitted]). This is to say that, where the parties have plainly expressed their intent in writing, the meaning of the writing is to be determined as a matter of law on the basis of the writing alone without resort to extrinsic evidence (*Chimart Assoc. v Paul*, 66 NY2d 570, 572 [1986], citing *Teitelbaum Holdings v Gold*, 48 NY2d 51, 56 [1979]). After all, there is a "heavy presumption that a deliberately prepared and executed written instrument [manifests] the true intention of the parties" (*Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]), and a correspondingly high order of evidence is required to overcome that presumption (*id.* at 219-220; *see also* 3 Corbin, Contracts § 615 at 745-746).

Here, there is no ambiguity as to the intent of the parties, which is plainly manifested in the various documents that were signed between the parties and offered to each tenant at 350

Cabrini Boulevard. First, under the December 20, 1984 contract of sale, The 350 Cabrini Company specifically sold the property to I. Kallman and Lax, which effectively made Kallman and Lax owners of the property. Further, as revealed in the offering plan, the April 2, 1985 contract of sale provided that the Sponsor (Jumax) "contracted to cause the property to be conveyed to the Apartment Corporation [the Co-op] by Bargain and Sale Deed . . . subject to all the terms and conditions of this Plan" (*see* Def. Statement of Material Facts, Ex. B at 54).

In addition, each proprietary lease and subscription agreement effectively provided that the offering plan was part and parcel of each document, where any conflict between the agreements "and the [offering] Plan shall be resolved in favor of the Plan; and all terms used herein shall have the same meaning as they do under the Plan" (*see* J. Kallman Aff., Ex. 4). The Assumption Agreements also noted that the Assignee (the Co-op) would be "subject to the terms, covenants, conditions and provisions of any other documents and applicable law, if any, to which the Contract is subject" (*see* Def. Statement of Material Facts, Ex. D). Furthermore, the Survival Agreement provided that all obligations under the plan would survive the closing (*see id.*, Ex. E), which would presumptively include the issue of roof rights. Finally, the offering plan explicitly evidences that Jumax, as Sponsor of the offering plan and as selling agent, retained "all rights to the roof and roof areas, and any transferable development rights, and shall have the right to transfer same without restriction of any kind" (*see* J. Kallman Aff., Ex. 1).

The Co-op argues that the Plaintiff never had any kind of ownership in the premises and never enjoyed any ownership interest of any kind in the premises (Def. Memo of Law at 10). This is plainly contradicted by the 1984 bargain and sale deed between The 350 Cabrini Company and I. Kallman and Lax. Obviously, I. Kallman and Lax were the owners of the premises prior to their converting the property into cooperative ownership, as was evidenced by

the contract of sale between The 350 Cabrini Company and I. Kallman and Lax. While the Assignment Agreements entered into by I. Kallman and Lax, doing business as Jumax, allowed Jumax to assign their "rights, title, and interest" in the 1984 bargain and sale deed to the Co-op, nonetheless Jumax continued to be beneficial owners of the building. As evidenced in the subscription agreements and other various agreements, which contemplated the integration of the offering plan into the various contractual agreements, the parties also intended Jumax to retain ownership of the premises, especially that of the roof. The offering plan itself notes that the "terms and conditions of this [offering] Plan and the exceptions subject to which the Apartment Corporation [the Co-op] is to take title may be omitted from the deed, but they shall nonetheless survive the closing" (*see* Def. Statement of Material Facts, Ex. B at 55).

Here, the parties expressed their intent in writing and nothing in the various agreements are anything less than complete, integrated expressions of the parties' contractual intent (*see 305 East 24th Owners Corp. v Parman Co.*, 122 AD2d 684, 695 [1st Dept 1987][Murphy, J., dissenting]; *rev'd* 69 NY2d 991 [1987][for reasons of Murphy, J.]). Because the writings are unambiguous as to their provisions and the documents require any conflicts as well as any terms and conditions to be resolved in favor and read in light of the offering plan, the court determines, as a matter of law, that Jumax retained the roof rights at 350 Cabrini Boulevard in 1986.

B. *Adverse Possession*

The defendant argues that, even if Jumax retained the roof rights under the original agreements, under CPLR 212, Jumax is barred from asserting any claim based on an interest in realty because ten years have elapsed from the date that Jumax claims to have obtained ownership of the roof area to the date of the commencement of this action. The court agrees.

Pursuant to CPLR 212, the plaintiff of the seized or possessed premises must bring an action to recover real property or its possession within ten years of the commencement of the action. Otherwise known as a claim for adverse possession, there must be a showing that the Co-op's ownership of the roof was hostile and under claim of right, actual, open and notorious, exclusive, and continuous (*see Belotti v Bickhardt,* 228 NY 296 [1920]; *Nazarian v Pascale*, 225 AD2d 381 [1st Dept 1996]). "Reduced to its essentials, this means nothing more than that there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period" (*Brand v Prince*, 35 NY2d 634, 636 [1974]; *Ray v Beacon Hudson Mt. Corp.*, 88 NY2d 154, 159 [1996]).

Here, the Co-op has made a showing that it owns the roof by the doctrine of adverse possession. There is no dispute that the Co-op claimed that it owns the roof under the Indenture Agreement. Further, the Co-op has openly and notoriously claimed ownership of the roof, as indicated by its agreements with outside vendors and even prior to its dealings with Cellular Telephone Company, to which Jumax never asserted legal title (*accord Seward Park Housing Corp. v Cohen*, 287 AD2d 157, 164 [1st Dept 2001][finding that it is open and notorious where "it is generally known and talked of by the public or the people in the neighborhood"]). In addition, it has been continuous and exclusive and without objection by Jumax until 2002, more than ten years after the 1986 Agreements were signed by the parties. The requirements for adverse possession has been met, and, accordingly, the Co-op owns the roof.

Jumax argues that there was no awareness of reservation of the roof rights to Jumax and that there was no knowing waiver (see Pl. Memo of Law at 6). However, that does not change the fact that the Co-op had shown enough that would "alert the owner of a claim to his land" and Jumax failed to assert that claim (*Cohen*, 287 AD2d at 164). To argue that there was no

indication or awareness on the part of Jumax is contrary to the Co-op's "so open, notorious and visible" use of the property and the roof (*id.*), and is contradictory to Jumax's claim to the roof under the agreements entered into between the parties in 1986 and reaffirmed in subsequent offering plan amendments. The true owner of the roof should have known and should have taken appropriate action. Here, where the plaintiff has failed to timely assert its rights, Jumax may not now claim that the roof is in its possession.

As such, the court, under CPLR 3212(b), grants judgment to the Co-op as to its first counterclaim and declares that the rights to the roof are to the Co-op.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that, in Motion Sequence 001, Defendant's Motion for Summary Judgment is granted and the Complaint is dismissed in its entirety, with costs and disbursements as taxed by the Clerk of the court upon the submission of an appropriate bill of costs; it is further

ORDERED that, in Motion Sequence 002, Defendants' Motion for Summary Judgment is granted and DECLARED AND ADJUDGED that Defendant 350 Cabrini Owners Corp. has rights to the roof and roof areas, and any transferable development rights, and shall have the right to transfer same without restriction of any kind; it is further

ORDERED that the remaining counterclaims by defendant are severed and shall continue; and it is further

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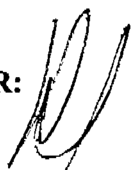
ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 18, 2006

ENTER: 

RICHARD B. LOWE, III, J.S.C.

RICHARD B. LOWE III

FILED
JAN 25 2006
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